



Kentucky Law Journal

Volume 28 | Issue 4

Article 4

1940

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Recommended Citation

Young, John L. (1940) "Copyright Law--Musical Style Piracy--Possible Methods of Legal Protection for the Musical Stylist," *Kentucky Law Journal*: Vol. 28 : Iss. 4 , Article 4.

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COPYRIGHT LAW

Musical Style Piracy—Possible Methods of Legal Protection for the Musical Stylist*

By JOHN L. YOUNG**

With the advent of the radio and its widespread commercial use¹ the problems of copyright regulation have increased a thousandfold.

While the controversy has centered around the respective rights of composers and authors in their dealings with broadcasters, there is yet another problem which has not up to this date found its way into the courts, but is certain to do so in the near future. This problem arises out of the fact that popular and distinctive styles of playing modern music are being pirated and copied from their originators by some of the lesser dance band leaders.

In recent years the music furnished by dance orchestras has been one of the most popular forms of radio entertainment and as a result many of these programs have been commercialized as an advertising medium with the sponsors paying fancy figures to secure the services of an orchestra with a distinctive style of playing.² In several instances leaders of talent have originated

* The primary purpose of this paper is to assert that the musical stylist does have property rights in his style and that such rights should be protected against infringement. The writer herein makes suggestions for revision of the copyright laws so as to recognize such rights. There has also been pointed out a method of protection capable of being administered by the courts in the absence of statutory protection. No cases nor text material appears on this precise point in so far as the writer can ascertain.

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¹ See 30 Col. L. R. 1087 (1930) where it is stated that in 1929 advertisers spent \$40,000,000.00 to reach a public listening to 12,000,000 receiving sets. . . . Of course, this figure has been tremendously increased in the past nine years.

² *Waring v. WDAS Broadcasting Co.*, 327 Pa. 433, 194 Atl. 631, 633 (1937). "Waring entered into a contract with the Ford Motor Co. to broadcast on one night of each week for the sum of \$13,500.00 for each performance." This is only one example of the amount of money involved in securing contracts for the broadcasting services of a popular dance band. Other well-known orchestra leaders command prices of similar magnitude for the services of their musicians as radio entertainers.

a style distinctive enough to create a great public demand for their orchestra. Because of the public's liking for such a distinctive musical creation the leader has become able to demand his own price for his band's services as an advertising medium.

Upon finding that the public likes a particular style as originated by an ingenious musician other musicians have organized bands and have imitated, to a greater or lesser degree, the style of the originator. There is no denying the fact that such an imitation is a capitalization on another's intellectual and artistic efforts. This state of affairs in the entertainment world creates our problem.

As has been previously stated, there has been no case arising out of this situation, but this fact is explainable upon several grounds.

In the first place, the imitators have not as yet risen to the popularity of the imitated, nor have they perfected the style to such a degree that they can compete for the same contracts with the imitated. Nevertheless, a case can easily be conceived where such would not be the facts, and then if the pirate should be awarded the contract for less money after a disagreement between the originator and the sponsor over the price to be paid, the originator would surely seek to protect his property rights from infringement by the pirate.

A second ground of explanation for the fact that no case of musical style infringement has been litigated is the status of our present copyright laws. Today our Copyright Act does not provide a method of registration for the copyrighting of "*styles of rendering music*" as such, but there is in existence a method of registration which approaches the present need only to the point of allowing copyright to "*arrangements*" of musical numbers. Of course, each number played by the orchestra in its peculiar style could be registered for copyright because a style is produced by the practice of reducing each musical number to a particular arrangement, but the practical objections are too numerous to permit such a procedure. Practically speaking, it would be impossible to make a written copy for copyright registration purposes of each and every musical composition played by an orchestra.

Therefore, it is very likely that the musical stylists have taken it for granted that they have no legal method of protecting their genius as expressed in their music.

In order to formulate effectively a plan whereby protection would be afforded such composers it seems necessary to draw analogies from three closely allied fields of the law. These fields are, namely: (a) *Copyright*, (b) *Unfair Competition* and (c) *Trade-Mark*.

While copyright laws are promulgated chiefly for the protection of artists, and unfair competition and trade-mark laws for the protection of business men, the recent merger of the arts with business, in the matter of broadcasting, affords sufficient cause for bringing principles of unfair competition and trade-mark law into copyright law.

The present Copyright Act and all amendments thereto spring from the Constitution which gives Congress the power, "To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."³ By judicial construction this grant has been extended to give Congress the power to allow copyright for many things which do not "promote the progress of science and the useful arts" in the strict sense, but such a construction does protect the creative efforts of those who, by their genius, supply the people with creations which are greatly in demand and which do serve a useful purpose.

It has been settled for years that a musical composition is a "writing" within the meaning of the Constitution, and as far back as the Copyright Act of 1831⁴ musical compositions were specifically named as copyrightable subjects. It has been consistently held that copyright is not confined to musical compositions that are absolutely original, but applies to any substantially new adaptation or arrangement of an old piece.⁵

In *Schuberth v. Shaw*⁶ the court said, "In all such cases (of copyright) the test of originality is applied to that which

³ Const. Art. I, § 8, cl. 8.

⁴ Act February 3, 1831 (4 Stat. 436, c. 16, sec. 1).

⁵ *Atwill v. Ferrett*, 2 Fed. Cas. No. 640 (C. C. S. D. N. Y. 1846); *Reed v. Carusi*, 20 Fed. Cas. No. 11,642 (C. C. D. Md. 1845).

⁶ 21 Fed. Cas. No. 12,482 (C. C. E. D. Pa. 1879).

represents the labor or skill of the person claiming the copyright.”

If an orchestra stylist should take each new piece, copyrighted or uncopyrighted, and re-arrange the orchestration so as to conform to his distinctive style he would undoubtedly be able to secure a copyright on his arrangement or orchestration of it. Still he has the problem of having to register *each* orchestration with the Librarian of Congress (as agent of the Copyright Office under the Copyright Acts) before he can be fully protected. Certainly he has shown originality by his own labor and skill in making such arrangements, and under the test set down above⁷ he could surely secure copyright of each of the orchestrations.

Even this method of protection is grossly inadequate because in most instances the popularity of the particular piece of music will have waned before copyright could be granted. Another objection to such a method lies in the fact that most modern musical compositions are so short-lived that any delay in securing copyright automatically does away with the advantage of securing a copyright. By the time the copyright is secured the piece has become virtually obsolete and no one has any desire to copy the style as applied to that particular piece.

One can easily see that such a method of protecting a style would be no protection at all for the stylist of popular musical tunes.

Leaving the statutory inadequacies and going to a consideration of common-law copyright we find that musical compositions are the subject of exclusive common-law property rights.

In the case of *Stern, et al. v. Carl Laemmle Music Co.*⁸ it was held that until publication a composer has a property right at common-law in an original musical composition which equity will protect, and such right does not depend on the copyright laws of the United States.⁹ The injection of the phrase, “until

⁷ 21 Fed. Cas. No. 12,482 (C. C. E. D. Pa. 1879).

⁸ 133 N. Y. Supp. 1082 (N. Y. Sup. Ct. 1911).

⁹ See also the opinion in *Waring v. WDAS Broadcasting Co.*, 327 Pa. 433, 194 Atl. 631 (1937) at p. 634 where it is held that, “. . . at common-law, rights in a literary or artistic work were recognized on substantially the same basis as title to other property. Such rights antedated the original Copyright Act of 8 Anne c. 19, and, while it has been uniformly

publication," into the holding does not affect the analogy because in the case of the stylist such writing of arrangements for use by his musicians as is necessary to produce the distinctive style would not be a publication, nor would public performance (broadcasting or playing before audiences) constitute a dedication to the public.¹⁰

Therefore, it would seem that although a musician has been playing music of distinction for several years he might still bring suit for piracy and predicate such suit upon his common-law rights in his origination of the style *as a style* and not upon his rights in a series of arrangements of musical compositions.

To better illustrate our problem let us take a few actual examples of style piracy in music as we hear it played today. A few years ago there was originated the idea of "singing song titles." The primary feature of the idea was to announce each musical number by singing the title to an appropriate orchestral accompaniment or "run" and then to go directly into the playing of the number in a very distinctive style.

This device of "singing song titles" has been utilized by at least two very prominent orchestra leaders who use it for purposes of identifying themselves over the air. The two most prominent users of "singing song titles" are Kay Kyser and Sammy Kaye. Without intimating which leader is the imitator, it is sufficient to state that there is a great similarity in the styles of these two orchestras. In fact, the styles are so similar that even most musicians are deceived by the respective broadcasts of these two orchestras unless frequent station announcements are made as to their identity.

Neither of these bands has been able (nor have they tried, so far as the writer has been able to ascertain) to secure copyright of their styles. This style of music is very popular with

held that the rights given by the Act supersede those of the common-law *so far as the Act applies*" (Italics added). (Citing *Donaldsons v. Beckett*, 4 Burr. 2408, 98 Eng. Rep. 257 (1774); *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055 (U. S. 1834); and *Holmes v. Hurst*, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. ed. 904 (1899) ". . . the common-law rights in regard to any field of literary or artistic production which does not fall within the purview of the copyright statute are not affected thereby." (Italics added.)

¹⁰ *Thomas v. Lennon*, 14 Fed. 849 (Cir. Ct., Dist. Mass. 1883). See especially, *Ferris v. Frohman*, 223 U. S. 424 (1911). Rules as to publication of musical compositions follow the analogies of dramatic compositions. See also, 13 Corpus Juris p. 986, section 52(5).

the public and as a result both leaders have profited. However, it seems that the originator should have some means of protecting himself and securing to himself, to the exclusion of all others, the right to play that particular style of music which was born of his intellectual and artistic efforts.

In the same category of musical stylists who use "singing song titles" we may also place Blue Barron, but Barron has not perfected the style to a degree sufficient to be classed as a competitor of Kyser and Kaye.

Further illustrating piracy of musical style is the imitation of Shep Fields' "Rippling Rhythm" music. There are several lesser musicians who have copied this manner of playing to some degree, but the most notable example is the leader who uses the same style and announces it as the "Babbling Brook" melody. Both leaders capitalize on the musical effect produced which so closely resembles in sound the rippling of a stream.

There would seem to be some doubt as to whether Fields could prevent the use of "Babbling Brook" as a style identification even if he has registered "Rippling Rhythm" as a trademark because the imitator is not seeking to pass off his music as that of Fields.¹¹ There yet remains the fact that the imitator is capitalizing on Fields' originality.

Whether the imitator's piracy will amount to "conduct tending to pass off one man's merchandise as that of his own"¹² will depend upon what interpretation the court will give to the phrase, "passing off." If "passing off" is to mean that the public must be deceived into thinking that the music is that of Fields then there would be no unfair competition, but if the more liberal interpretation is given, and it is held that the phrase means an advertiser will be willing to accept the imitation as being just as good as Fields' and will give the contract to the imitator rather than to Fields because the imitator is cheaper, then the doctrine of unfair competition should protect Fields. The more liberal interpretation has been adopted in one instance.¹³

¹¹ Sweet Sixteen Shops of Detroit v. Goodman, et al., 219 N. W. 599 (Mich. 1928).

¹² Autoline Oil Co. v. Refining Co., 3 Fed. (2d) 457 (D. C. Md. 1924). Syllabus.

¹³ International News Service v. The Associated Press, 248 U. S. 215, 39 Sup. Ct. 68 (1918). See also 51 Harv. L. Rev. 171, 172; and 33 Mich. L. Rev. 321, 331.

The protection of the trade-mark "Rippling Rhythm" would be merely incidental to protection of the style itself since the style is the merchandise in this analogy and the trade-mark serves only to distinguish the style from other music and to give publicity to it.

Therefore, if a means can be found to protect the style, the trade-mark would be automatically protected. This automatic protection arises from common-law trade-mark rights since redress accorded in trade-mark cases is based on the party's right to be protected in the good will of his trade or business.¹⁴

Other examples of similarity in musical styles and interpretations in which there is identity of varying degrees may be given. Eddie Duchin, the piano stylist, has a competitor in the person of Henry King, also a piano stylist. Whether or not there is piracy here the writer is not prepared to say, nor is there any opinion expressed as to the similarity of style existent in the music of Jan Garber and his contemporary, Guy Lombardo. An example of combination of styles is George Hamilton's "Music Box" music. This popular stylist uses the Fields style with introductions in the Duchin manner.

A search through the authorities revealed that the nearest approach to a case of the type anticipated by this article is the case of *Waring v. WDAS Broadcasting Station, Inc.*¹⁵ This case, decided in October of 1937, by the Supreme Court of Pennsylvania involved the right of an orchestra leader to enjoin the broadcast of his interpretations of musical numbers from unlicensed phonograph records. The injunction was granted with the whole court of seven judges assenting. There was a dissent as to part of the rationale by Justice Maxey,¹⁶ but he concurred in the result.

It is quite evident that any future cases arising under an asserted right of an orchestra leader to a particular style of music will be based on the reasoning and holding of the majority in this Pennsylvania case.

The majority recognizes the novelty of the problem and states that it has never been presented to an English or American

¹⁴ *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 404 (1916).

¹⁵ 327 Pa. 433, 194 Atl. 631 (1937).

¹⁶ 194 Atl. at p. 642.

Court.¹⁷ Justice Maxey in his separate opinion¹⁸ says it is not a novel case, fundamentally, but "exhibits an invasion of an ancient right . . . the right of privacy."

It is quite probable that Justice Maxey is right and the particular case before the court did involve the right of privacy of the plaintiff. Even conceding that the case could have rightly been decided solely on the right of privacy,¹⁹ the right of privacy will not be an answer to a case of piracy of style brought by one musical stylist or orchestra leader against a pirating competitor.

A careful study of the *Waring* case reveals that the court has in mind most of the difficulties standing in the way of a solution to the contemplated problem, in the absence of special Congressional action bringing the situation within the Copyright Act.

The plaintiff in the *Waring* case admitted that he was not protected under the existing copyright laws, but maintained that he had valuable common-law property rights which should be protected by equity.²⁰ Upon granting the requested relief the court stated that although the plaintiff did not in precise terms charge unfair competition he had alleged sufficient facts to enable the court to grant injunctive relief on the grounds of unfair competition.

In arriving at its conclusion the court considered three questions:

- "(1) Have performers . . . in this case, an orchestra . . . any enforceable property rights in their artistic interpretations of the work of a composer?
- "(2) If so, to what extent can such rights be reserved at the time of what the law designates a 'publication'?
- "(3) As ancillary to such rights, under what circumstances can performers be afforded equitable relief on the ground of unfair competition?"

¹⁷ *Id.* p. 632—Justice Stern.

¹⁸ *Id.* p. 642.

¹⁹ Several grounds for the decision in the *Waring* case have been suggested, one of which is that there was involved an equitable servitude on a chattel, 51 Harv. L. Rev. 172 (1937); For comments on the *Waring* case see: 9 Air Law Rev. 99, 102 (1938); 42 Dickinson L. Rev. 88 (1938); 26 Georgetown L. Rev. 504 (1938); 6 Geo. Wash. L. Rev. 237 (1938); 51 Harv. L. Rev. 171 (1937); 23 Wash. U. L. Q. 283 (1938); 24 Va. L. Rev. 333 (1938).

²⁰ 194 Atl. 631 (cited in footnote 15 *supra*) at p. 633 of the opinion.

The court answers the first question in the affirmative and in doing so goes back into the common-law of copyright before the first English copyright act of 8 Anne c. 19. From there it works its way through analogies drawn from copyrightable arrangements of operatic scores,²¹ reports of a public speech,²² translation or dramatization of a novel²³ up to the present day and concludes that a performer who contributes something of an intellectual or artistic value to a musical composition has thereby acquired property rights which do not over-lap those of the author or composer of the work. The court then holds that the interpretation is an *independent work of art*.

Having concluded that an *interpretation* gives a property right, the court decided that there had not been a "publication" as construed in law. To support this holding there was cited *McCarthy and Fisher v. White*,²⁴ *Uproar Co. v. National Broadcasting Co.*,²⁵ and other cases which hold that in order to be a "publication" which destroys property rights there must be "such a dissemination of the work of art itself among the public as to justify the belief that it took place with the intention of rendering such work common property."²⁶

The third and final question is answered by *International News Service v. Associated Press*,²⁷ a case involving news gathered at great expense by Associated Press and pirated by its competitor. The court in that case granted an injunction not on the basis of any absolute property in news as such, but on the basis of unfair competition.

The court in the *Waring* case quoted this phrase verbatim from the *Associated Press* case,

"Obviously, the question of what is unfair competition in business *must be determined with particular reference to the character and circumstances of the business.*"²⁸

²¹ Wood v. Boosey, 2 L. R. Q. B. 340 (1868).

²² Walton v. Lane, (1900) A. C. 539.

²³ Fleron v. Lackaye, 14 N. Y. Supp. 292 (Sup. Ct. 1891).

²⁴ 259 Fed. 364 (D. C. S. D. N. Y. 1919). Playing of a musical composition is *not* a publication.

²⁵ 8 Fed. Supp. 358 (D. O. Mass. 1934). Performance over the radio is *not* a publication.

²⁶ American Tobacco Co. v. Werckmeister, 207 U. S. 284 (1907) quotes the test as set forth on p. 92 of Slater on the Law of Copyright and Trade-Marks.

²⁷ 248 U. S. 215 (1918).

²⁸ 194 Atl. (Pa.) 631 at p. 639. (Italics added.)

If we follow the court's test as laid down above in the *Associated Press* case as to what is to be considered in determining unfair competition we can easily see that any imitator of a distinctive style of music is engaging in unfair competition with the originator in the "*business*" of musical entertainment.

The only possible justification for such conduct would be that the unfair competitor did not offer his "goods" for sale in the same market against the originator. This possibility of a defense becomes obviated when it is proved that both styles of music have been broadcast over an all-inclusive radio network or even by proof of broadcasting over a single powerful radio station reaching different parts of the country.

Mr. Justice Brandeis dissented in the *Associated Press* case on the ground that the gathering of news was a business involving a complexity of public and private interests and that the court should not create a new private right when such right, if created, might work serious injury to the general public.²⁹ However, Mr. Justice Brandeis in concluding his dissent admitted that even in cases of news gathering, which is affected with a public interest, there should be some remedy for one who has put forth time, money, and intellectual effort in creating something new.³⁰

In defense of his position Mr. Justice Brandeis seizes upon the age-old excuse of courts of equity and says,

"The courts are *ill-equipped* to make the investigation which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear."³¹

While it is agreed on all sides that Mr. Justice Brandeis is right in saying the legislature should be the body to give such property rights and as one writer puts it, "his (Mr. Justice Brandeis') progressivism needs no footnote reference,"³² still

²⁹ *International News Service v. Associated Press*, 248 U. S. 215, 262 (1918).

³⁰ *International News Service v. Associated Press*, 248 U. S. 215, 267 (1918). ("... the propriety of some remedy appears to be clear.")

³¹ *Id.* p. 267. (Italics added.)

³² Fathchild, "STATUTORY UNFAIR COMPETITION" p. 25. (Reprinted from *Missouri L. Rev.*, Vol. I, No. I, January, 1936.)

he seems to have based his dissent in the *Associated Press* case upon a very poor reason.

It is not argued that the legislature is less able to cope with the situation than are the courts, but it is argued that in the absence of such a right being given by the legislature the courts should intervene upon general equitable principles and afford protection to valuable property rights. It is also urged that the courts have adequate machinery to enforce such rights after the rights have been recognized.

As an illustration of the effectiveness of such machinery it is only necessary to cite a case in which it was used to good advantage.

In *Schuberth v. Shaw*³³ there was a suit for infringement of rights in an arrangement for the "Maneola Waltzes." The court, after taking testimony made a preliminary order appointing two musicians as experts to report, "Whether the 'Maneola Waltz', published by complainants, is musically different from the Waldteufel composition, in what the difference consisted, and whether complainants' publication is an original musical composition representing any musical authorship."³⁴

These experts, appointed by the court, reported as follows:

"While we do not consider the publication an original composition, with the exception of the harmony in the last three bars of the introduction, we regard it as an original arrangement, and the work of a practical harmonist and musician."³⁵

The court held that the complainants' publication was a substantially new adaptation of an old piece which might be copyrighted and that an injunction should be granted.

The above case demonstrates a method by which courts could conveniently determine whether a style has been pirated or is original. Moreover, it suggests a method by which a protective provision in a copyright amendment for musical styles could be enforced.

Since musical styles or interpretations are not protected by the copyright laws of the United States the matter of amendment of the laws so as to protect such property would seem, at first thought, to be a rather simple procedure, but a mere insertion of

³³ 21 Fed. Cas. No. 12,482 (C. C. E. D. Pa. 1879).

³⁴ *Id.*, p. 739.

³⁵ 21 Fed. Cas. No. 12,482 at p. 739 (C. C. E. D. Pa. 1879).

the subject "musical styles" or "personal interpretations of music" into sec. 5 of 17 U. S. C. A.³⁶ would not give adequate protection, since there is no provision for registration of such property.³⁷

The addition of "musical styles" to our present copyright act would require revision of sections 9 to 12, inclusive, of 17 U. S. C. A. with a specific provision in section 11 allowing the deposit of phonograph recordings³⁸ of samples of the "musical style" or "personal interpretation" sought to be copyrighted.

Having once amended our copyright laws to allow copyright of musical styles it would be a mere matter of form to dispose of any infringement proceedings. This could be accomplished by the appointment of a Commissioner of Musical Copyright or an examiner (as is done in the Patent Office) who would be a musical expert.³⁹ This musical expert would be able to determine whether there was an attempted piracy of style. This same examiner could adjudicate the rights of stylist litigants by an analysis of the recorded copyright samples, together with recorded samples of music played by the alleged pirate.

In concluding it may be stated that even though the problem discussed above has not yet troubled the minds of jurists in a case demanding decision on the exact point, it will be only a very few years at the latest until they will be required to decide.

Protection for this group of artists and composers may best be provided through legislation. This legislation could well

³⁶ If "musical styles" or "personal interpretations of music" were to be added to the list of copyrightable subjects, it would be classified as "sec. 5" classification, "(n)" in 17 U. S. C. A.

³⁷ "Fred Waring, in 1935, made application to the Register of Copyrights for a copyright on 'the personal interpretation by Fred Waring, of the musical composition 'Lullaby of Broadway.' The application was rejected, the Register saying, inter alia: 'There is not and never has been any provision in the Act for the protection of an artist's personal interpretation of a musical work not expressible by musical notation in the form of legible copies, although the subject has been extensively discussed both here and abroad . . .' (Italics added.) See Waring v. WDAS Broadcasting Station, Inc., 194 Atl. 631 (1937) n. 2, p. 633 at p. 634.

³⁸ It is submitted that phonograph recordings as samples of the style would be the most satisfactory means of registering the "style" for copyright and in order to facilitate hearing on infringement claims the applicant should be required to file a recording of three numbers, varying in tempo and type of music. A suggested variation of the three sample recordings would be: (a) *Classical Composition*, (b) *Semi-Classical*, (c) *Popular*.

³⁹ As suggested by the Court's action in *Schuberth v. Shaw* cited in footnote 33, *supra*.

follow the outline suggested above for making the necessary amendments to our copyright laws in order to bring them up to date with respect to musicians.

In the absence of broader legislation upon the subject the courts of equity should protect the property rights of musicians upon the principles of unfair competition. The road to protection *by the courts* has been surveyed by the *Waring* case⁴⁰ and with a direct holding upon the doctrine as announced there, the road to full protection is open, even in the absence of legislation.

Qualified and recognized composers and artists should be fully protected in their artistic originations. Mere aspirants should be forced to use their own efforts to gain recognition.

⁴⁰ *Supra* n. 15.

KENTUCKY LAW JOURNAL

Volume XXVIII

May, 1940

Number 4

Published four times a year by the College of Law, University of
Kentucky: Issued in November, January, March, and May.

Subscription Price \$2.50 per Year.....75c per Number

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